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In The

Supreme Court of the United States

October Term, 1995

TIMOTHY DURKIN; JOHN DURKIN; NICHOLAS BONELLI,
Petitioners,

vs.

MAJOR LEAGUE BASEBELL; NATIONAL FOOTBALL LEAGUE; NATIONAL BASKETBALL ASSOCIATION; NATIONAL HOCKEY LEAGUE; COLUMBIA BROADCASTING SYSTEM, INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.; ESPN SPORTS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC., FOX BROADCASTING, INC.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should Respondents' willful violation of their own special interest antitrust legislation go without remedy when the violation causes consumers to pay higher prices for the increasingly important informational service of cable television, and when to ignore Respondents' violation constitutes selective application of the federal antitrust laws?

2. Does antitrust jurisprudence tolerate granting the exclusive right to bring treble damages action pursuant to § 4 of the Clayton Act to local cable operators who because of their "undue market power" as compared to that of consumers and suppliers, *Turner BroadcastingSystem, Inc. v. FCC,* 114 S. Ct. 2445, 2454 (1994), are unlikely to perceive antitrust injury and enforce the antitrust laws?

LIST OF PARTIES

Petitioners, Timothy Durkin, John Durkin, and Nicholas Bonelli, filed this class action on behalf of all subscribers to cable television who pay increased subscription prices as a result of collective agreements in direct violation of special interest antitrust legislation. Petitioners were appellants in the Third Circuit Proceeding from which this petition arises.

Respondents are four professional sports leagues: Major League Baseball[1] (MLB), National Football League (NFL), National Basketball Association (NBA), and National Hockey League (NHL); three cable television networks: ESPN Sports Network, Inc. (ESPN), and Turner Broadcasting System, Inc. (TBS and TNT); and four broadcast television networks: Columbia Broadcasting System, Inc. (CBS), American Broadcasting Companies, Inc. (ABC), National Broadcasting Company, Inc. (NBC), and Fox Broadcasting, Inc. (FOX). Respondents were appellees in the proceeding from which this petition arises.

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1. Petitioners note that since September of 1992 when Faye Vincent resigned as Commissioner, there has been no independent Commissioner of Major League Baseball.

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Appendix A — Memorandum Opinion and Judgment of the United States Court of Appeals for the Third Circuit Filed April 30, 1996 ..... 1a

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OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Third Circuit is reproduced in Appendix A at 1a. The unreported opinion of the district court in this case is reproduced in Appendix B at 1 2a.

STATEMENT OF JURISDICTION

The Third Circuit's judgment was entered on April 30, 1996. App. A. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among several States . . ., declared to be illegal. . . .

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 1 of the Sports Broadcasting Act, 28 U.S.C. § 1291, provides:

> The antitrust laws, . . . , shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional team sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such league's member clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

STATEMENT OF THE CASE

On August 29, 1994, Petitioners filed a class action antitrust suit charging Respondents with, *inter alia,* entering into collective agreements (pooled rights agreements) in violation of the Sports Broadcasting Act and section one of the federal antitrust laws. Petitioners alleged that as a direct result of the pooled agreements between Respondent professional sports leagues and Respondent cable networks, Petitioners were caused to pay higher cable television subscription rates than they would have paid in the absence of said pooled agreements. Petitioners sought both treble damages pursuant to section four of the Clayton Act *as well as injunctive relief.* Broadcast networks were included as defendants on alternative theories that either: (1) they were parties to pooled rights agreements with non-exempt cable television networks; and or (2) they entered into pooled agreements with Respondent sports leagues after the leagues had forfeited their exempt status by entering into pooled agreements with cable television networks.

Respondents moved for dismissal of Petitioners' complaint on grounds that cable television subscribers, as indirect

purchasers, had no standing to bring an action for treble damages under the Clayton Act, and that such cause of action belonged to local cable operators exclusively. In affirming the district court's decision dismissing Petitioners' action, the court of appeals dismissed Petitioners' action solely on the basis of their indirect purchaser status. App. A (5a). Because Petitioners introduced various legal arguments which were not tested against *Illinois Brick* by the lower courts, or referenced to in the lower courts' decisions ("We make no judgment as to the legality of the sports leagues' contracts with ESPN and Turner, nor do we address whether the SBA can be interpreted to exempt these contracts from the antitrust laws." App. A (8a)), Petitioners respectfully brief the arguments in this Petition.

REASONS FOR GRANTING THE WRIT

1. Failure of circuit court to consider per se violation of special interest antitrust legislation: During testimony before the House of Representatives, then NFL Commissioner Peter Rozelle who represented the special interest primarily promoting the Sports Broadcasting Act was asked: 'You understand, do you not Mr. Rozelle, that the Act [Sports Broadcasting Act] covers only agreements with broadcast television, and does not cover agreements with pay or subscription television networks?" Mr. Rozelle answered: "Absolutely." Hearing Before the Antitrust Subcommittee, House Committee on the Judiciary, 87th Congress, H.R. 8757.

2. Overcharges affecting 65 million consumers implicates the public interest. This Court has recognized that in enacting the Sherman Act "Congress was primarily interested in creating an effective remedy for consumers who were forced to pay excessive prices by the giant trusts and combinations that dominated certain interstate markets." *Associated General Contractors v. Carpenters*, 459 U.S. 519, 530 (1983).

3. In oral argument before this Court in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), Mr. Justice Stewart asked counsel "What would you do with the case where the ultimate consumer sues, either individually or as a class, and that the first buyers do not sue, and the statute of limitations runs. So its very clear that the first buyers can never sue?" Transcript of Oral Argument, Page 20. Counsel responded: "I think the answer to the question is, the practical answer to your question, Mr. Justice Stewart, is that that is a very unlikely scenario." Transcript of Oral Argument, Page 21. The "very unlikely scenario" referred to by Justice Stewart has occurred in that due to the four year statute of limitations regarding antitrust claims, there are approximately two years worth of damages where there can be no double recovery, and the clock continues to run.

4. In *AGC*, this Court established a five-part test to determine antitrust standing of an indirect purchaser. The Third Circuit recognized this test and applied the analysis in *In re Lower Lake Erie*, 998 F.2d 1144 (3d Cir. 1993). "While recognizing that the Supreme Court had recently enumerated the list of factors to be utilized in § 4 cases in *AGC*, we decided the case [*Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1984), *cert. denied*, 465 U.S. 1024 (1984)] solely on the operation of the *Illinois Brick* concern, ... The facts of the present case, however, require, under *AGC*, a more complete analysis, to which we now turn." *In re Lower Lake Erie*, at 1166-1167 (3d Cir. 1993). Without explanation, the Third Circuit differentiates between the "indirect purchaser" analysis applied in *Merican, Lower Lake Erie*, and the instant case. Finally, the lower court ignored Petitioners' request for injunctive relief despite its recent recognition that the direct purchaser rule does not bar such relief. *McCarthy v. Recorder Services, Inc.*, 80 F.3d 842 (3d Cir. 1996).

I. Respondent sports leagues and Respondent cable television networks entered into pooled agreements in direct violation of their own special interest legislation (the Sports Broadcasting Act), thereby forfeiting protection of the Act.

All four Respondent sports leagues entered into pooled agreements involving the television rights to their respective contests with cable television networks. Respondent National Football League entered into pooled agreements with Respondents ESPN and TNT. Respondent Major League Baseball entered into pooled agreements with Respondent ESPN. Respondent National Basketball Association entered into pooled agreements with Respondents TBS and TNT. Respondent National Hockey League entered into pooled agreements with Respondent ESPN.

Pooled rights agreements between professional sports leagues and television networks were found to be an unreasonable restraint of trade in violation of section one of the federal antitrust laws. *United States v. National Football League*, 196 F. Supp. 445 (E.D. Pa. 1961). Title 15 U.S.C. § 16(a) provides:

> Prima facie evidence; collateral estoppel. A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws to the effect that the defendant has violated said laws, shall be prima facie evidence against such defendants.

In response to the district court's decision in *United States v. National Football League*, professional sports and broadcast television networks successfully lobbied Congress for an

antitrust exemption commonly known as Sports Broadcasting Act. 28 U.S.C. § 1291. The Act provides:

> The antitrust laws shall not apply to any joint agreement by or among persons engaging in or conducting the organized professional sports of football, baseball, basketball, or hockey, by which any league of clubs participating in professional football, baseball, basketball, or hockey contests sells or otherwise transfers all or any part of the rights of such leagues' members clubs in the sponsored telecasting of the games of football, baseball, basketball, or hockey, as the case may be, engaged in or conducted by such clubs.

It is well-settled that antitrust exemptions are to be construed narrowly "with beady eyes and green eyeshades." *Chicago Professional Sports Ltd. Partnership v. National Basketball Association*, 961 F.2d 667, 671-672 (7th Cir. 1992). "When special interests claim that they have obtained favors from Congress, a court should ask to see the bill of sale. . . . What the industry obtained, the courts enforce; what it did not obtain from the legislature — even if similar to something within the exception — a court should not bestow." *Chicago Sports Ltd.*, at 671 (7th Cir. 1992) (discussing the Sports Broadcasting Act). The narrow construction rule applies with equal force to express statutory antitrust exemptions such as the Sports Broadcasting Act. *Group Life & Health v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). This Court has strictly construed antitrust exemptions even where a broader interpretation was reasonable. *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 732-733 (1973).

That a particular industry changes over time does not alter

this rule of statutory construction. In *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1977), the Court noting changes in the agricultural industry held:

> We may accept the proposition that agriculture has changed in the intervening 55 years, but, as the second Mr. Justice Harlan said, when speaking for the Court in another context, a statute "is not an empty vessel into which this Court is free to pour a vintage we think better suits present days tastes." *United States v. Sisson*, 399 U.S. 267, 297 (1970). Considerations of this kind are for Congress, not for the courts.

436 U.S. at 827. Despite the statutory prohibition on collective agreements with cable television networks, Respondent sports leagues tapped into the forbidden revenue source of subscription television.

Further support for Petitioners' position is found in sworn testimony before the House of Representatives by then NFL Commissioner Peter Rozelle who was asked: "You understand do you not, Mr. Rozelle, that the Act covers only agreements with broadcast television, and does not cover agreements with pay or subscription television?" Mr. Rozelle responded: "Absolutely." Hearings before the Antitrust Subcommittee (Subcommittee No. 5), House Committee on the Judiciary, House of Representatives, 87th Congress, H.R. 8757, August 28, 1961. The legislative report issued on the Act states: "The exemption provided by section 1 of H.R. 9096 (the Sports Broadcasting Act) applies to the sale or transfer of rights in the sponsored telecasting of games. The bill does not apply to closed circuit *or subscription television.*" House Report No. 1178, "Telecasting of Professional Sports Contests" submitted by the Committee on the Judiciary, September 13, 1961, page 5.

Finally, the United States District Court for the Northern District of Illinois conducted an exhaustive analysis of whether pooled agreements between professional sports leagues and cable television networks ESPN and TNT were protected under the Sports Broadcasting Act, and concluded that ". . . TNT, like ESPN, falls outside the statutory meaning of sponsored telecasting." *Chicago Sports Ltd. v. National Basketball Association*, 808 F. Supp. 646, 650 (N.D. III. 1992).

If sports leagues' collective agreements with ESPN and Turner are not protected under the Sports Broadcasting Act, then pursuant to this Court's holding in three separate cases, the sports leagues forfeited their antitrust protection. *Case-Swayne Co. v. Sunkist Growers, Inc.*, 389 U.S. 384 (1967); *National Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978); and *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979). "In analagous contexts, the Court has held that an exempt entity forfeits antitrust exemption by acting in concert with nonexempt parties." *Group Life & Health*, at 231. Yet in derogation of the Court's holdings, the Third Circuit's decision states:

> Indeed, we find it somewhat disingenuous to on the one hand admit that a federal court cannot invalidate a statute on non-constitutional grounds and on the other hand argue that the court should invalidate, on non-constitutional grounds, the protections offered by the same statute.

App. A (5a).

Under the Third Circuit's reasoning, there would be no remedy for the deliberate violation of a statutory antitrust exemption except to declare it unconstitutional. Moreover, Respondents admit that "The cases upon which Plaintiffs rely

stand only for the unremarkable proposition that, where the facts in a particular case do not support the application of an exemption, the defendant cannot in that case avail itself of that exemption as an affirmative defense." Brief of Appellees, Page 10.

II. Pursuant to this Court's rule of reason analysis in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the pooled agreements violate the federal antitrust laws.

In *NCAA v. Board of Regents*, 468 U.S. 85 (1984), this Court cited three anticompetitive consequences resulting from collective agreements between universities and broadcast television networks, and struck down the agreements. First, individual universities lost their ability to sell telecasting rights to football games to the television station of their choice. 468 U.S. at 104-105. Second, both once and output were unresponsive to consumer demand. 468 U.S. at 108, n. 33. Third, only television broadcasters that were large enough to bid on the entire collective package were able to enter the market. 468 U.S. at 108, n. 36.

All three anticompetitive consequences noted by the Court in *NCAA* are present in the collective agreements challenged by Petitioners. First, when sports leagues enter into collective agreements with television networks, each individual club forfeits the ability to sell telecasting rights to the television network of its choice. Second, each individual club receives the same amount of money regardless of either the popularity of the teams, or the extent of the television coverage (*i.e.*, how many markets see the game). Third, when sports leagues package the telecasting rights to league games, the cost of the resulting package prohibits local television stations from entering the market. The Court in *NCAA* noted that Congress' decision to enact a statutory exemption for such collective agreements implied that absent the exemptions the agreements are in

violation of the federal antitrust laws. ". . . it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights." *NCAA v. Board of Regents*, 468 U.S. 85, at 104 n. 28 (1984).

III. Direct purchaser local cable operators lack incentive to challenge pooled agreements between Respondent sports leagues and Respondent cable television networks.

In *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the Court recognized that some direct purchasers may "refrain from bringing a treble-damages action for fear of disrupting relations with their suppliers." 431 U.S. at 746. Local cable operators harbor no fear of legal actions disrupting relations with their suppliers in that they enjoy a dual ended monopoly within the relevant distribution chain. Just as Petitioners have no alternative but to deal with the local cable operator assigned to their geographical region or do without, suppliers of cable television programming such as Respondents ESPN, TBS, and TNT have no alternative but to deal with the assigned local cable operators or forfeit distribution of their programming in that region. In light of local cable operators' unique market power that is generally not tolerated, they are not likely to perceive antitrust injury and enforce the antitrust laws.

Indeed, this Court recognized the unique market powers of local cable operators in *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445 (1994) "Congress concluded that due to 'local franchising requirements and the extraordinary expense of constructing more than one cable television system to serve a particular geographic area', the overwhelming majority of cable operators exercise a monopoly over cable services. 'The result,' Congress determined 'is undue market power for the cable operator as compared to that of consumers and video programmers.' " *Turner Broadcasting System, Inc.*, at 2454.

Cable operators, by virtue of the technology, possess bottleneck or gatekeeper control over subscriber access to certain programming. *Turner Broadcasting System, Inc.*, at 2466.

While in most antitrust violations the most foreseeable plaintiff will be the more direct purchaser, there are instances where more remote parties might be more likely to pursue the action. *Sullivan v. Tagliabue*, 25 F.3d 43, 51 (1st Cir. 1994). An "obvious reason for conferring standing on a second best plaintiff is that, in some general category of cases, there may be no first best with the incentive or ability to sue." *SAS of Puerto Rico v. Puerto Rico Telephone Co.*, 48 F.3d 39, 45 (1st Cir. 1995) (citing to *Associated General Contractors v. Carpenters*, 459 U.S. 519, 536 (1983)). This Court has expressed its interest in seeing antitrust violations prosecuted. "Denying the union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied." *General Contractors*, 459 U.S. at 542. Denying standing to Petitioners will allow Respondents' deliberate violation of special interest antitrust exemption to go unchallenged and without remedy. Moreover, Petitioners' request for injunctive relief which presents no concerns of duplicate recovery or complex apportionment is not barred by indirect purchaser status. *McCarthy v. Recordex Service, Inc.*, 80 F.3d 842 (Fed. Cir. 1996); *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 589-594 (3d Cir. 1979); *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148, 1167 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980).

IV. The five-factor test established by the Court in *Associated General Contractors* supports the grant of standing to indirect purchaser cable subscribers.

The circuit court upheld the district court's dismissal holding that "The Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny foreclose

appellant's argument and support the district court's ruling. In *Illinois Brick,* the Court held that indirect purchasers lack standing to bring treble damages in antitrust actions for costs allegedly passed on by direct purchasers." App. A (5a). The circuit court did not apply the five part test of *Associated General Contractors* established by this Court to determine when indirect purchasers might have standing to bring such actions.

The first factor considered is the causal connection between Respondents' alleged violation and Petitioners' alleged harm, and the Respondents' intent to cause that harm. The district court stated that "While defendants may have intended to increase their agreements to increase profits, they would hardly intend to drive away viewers by causing cost increases beyond what the market would bear." App. B (18a). The district court's statement ignores both Petitioners' allegations that the challenged agreements increased cable subscription sales, and the unique market powers enjoyed by local cable operators.

In *Blue Shield of Virginia v. McCready,* 457 U.S. 465 (1982), the Court focused on the question of nexus of injury. Blue Shield argued that because the alleged conspiracy was directed at psychologists rather than subscribers, only psychologists had standing. Soundly rejecting this notion, the Court concluded that plaintiff subscribers' injury was not "remote" simply because the intended targets of the conspirators were not the subscribers.

> The availability of the § 4 remedy to some person who claims its benefit is not a question of the specific intent of the conspirators. Here the remedy cannot reasonably be restricted to those competitors whom the conspirators hoped to eliminate from the market .... Denying reimbursement to subscribers for the cost of treatment as the very means by which it is alleged that Blue Shield sought to

> achieve its illegal ends. The harm to McCready and her class was foreseeable; indeed it was a necessary step in effecting the ends of the illegal conspiracy. Where the alleged injury is so integral an aspect of the conspiracy alleged, there can be no question but that the loss was precisely '"the type of loss that the claimed violations . . . would be likely to cause."

McCready, 457 U.S. at 479.

The second *AGC* factor involves Petitioners' alleged injury and whether it is the type for which the antitrust laws were intended to provide redress. In order to recover damages under § 4 of the Clayton Act, private plaintiffs "must prove the existence of antitrust injury which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)(quoting *Brunswick*, 429 U.S. at 489). In *Reiter v. Sonotone*, 442 U.S. 330 (1979), this Court held that where retail consumers have been forced to part with more money to purchase goods than they would have in the absence of conduct in violation of the antitrust laws, then consumers have suffered antitrust injury within the meaning of § 4 of the Clayton Act. "As a consumer of psychotherapy services entitled to financial benefits under the Blue Shield plan, we think it clear that McCready was within that area of the economy . . . endangered by [that] breakdown of competitive conditions resulting from Blue Shield's selective refusal to reimburse." *McCready*, at 480-481. Similarly, Petitioner cable subscribers are participants within the market tainted by Respondents' misconduct in violation of the antitrust laws.

Notwithstanding the rule of reason analysis, the per se

violation of the Sports Broadcasting Act "relieves plaintiff of the burden of demonstrating an anticompetitive effect, which is assumed. . . ." *Newman v. Universal Pictures*, 813 F.2d 1519, 1523-1524 (9th Cir. 1987), *cert. denied*, 486 U.S. 1059 (1988). The Third Circuit's conclusion that " 'no harm, no foul' is perhaps the most appropriate way to characterize Appellants claims," App. A (8a), is in direct conflict with both the rule regarding presumption of harm for violation of a statutory antitrust exemption and Petitioners' allegations. Petitioners have several prominent academics prepared to testify to the inevitability of a price increase for cable television service caused by collective agreements between professional leagues and cable networks. In addition to implicating all three anticompetitive aspects criticized by this Court in *NCAA v. Board of Regents*, the alleged price increase, which the lower courts were obligated to accept as true, satisfies the plaintiffs' initial burden of proof of harm under rule of reason analysis. *United States v. Brown University*, 5 F.3d 658 (3d Cir. 1993).

Finally, Petitioners' injury is made more egregious in that the tainted product of sports programming is tied to other popular programming such as CNN, AE, etc. Cable subscribers (sports fans and non-sports fans alike) must either pay the overcharge, or go without cable television entirely. The typical basic cable package does not allow Petitioners to reject only the Respondent cable networks causing the price increase by their illegal and unprotected agreements. The price fixer of a basic commodity cannot escape the reach of treble damages by incorporating the tainted element into another product. *In re Sugar Antitrust Litigation*, 579 F.2d 13 (3d Cir. 1978) (citing to the Clayton Act, 15 U.S.C. § 15).

The third factor considers the directness of the injury. Petitioners pointed out in oral argument before the district court that when Respondents comply with the Sports Broadcasting Act, the leagues and broadcast networks enter into pooled

agreements, and the broadcast networks distribute the games to Petitioners at no cost. "A cable operator shall not accept or request monetary payment or other valuable consideration in exchange either for carriage of local commercial television stations in fulfillment of the requirements of this section or for the channel positioning rights provided to such stations under this section. . . . " *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, 143, Section 4, "Carriage of Local Commercial Television Signals" (1992). On the other hand, when professional leagues enter into pooled agreements with cable television networks, distribution of the telecasts requires the imposition of a third party local cable operators, and plaintiffs are required to pay for the telecasts. Thus, pooled agreements between leagues and cable television networks cause Petitioners to pay higher costs, and render them indirect purchasers of programming by injecting the local cable operators into the distribution chain. A court must guard against a situation in which a party imposes a middleman as a shield against antitrust liability. *Schwimmer v. Sony Corp.*, 637 F.2d 41, 48 (2d Cir. 1980).

The fourth *AGC* factor involves the possibility of more direct victims. The district court summarily dismissed this issue as well by stating that even if local cable operators passed on one hundred percent of the overcharge, local cable operators may have suffered injury in the form of losing customers or absorbing costs. "As discussed above, local cable operators are more directly affected by the antitrust violations. Even if they are able, as plaintiffs suggest, to recover all of their increased costs, the operators still run the risk of losing customers or having to absorb the costs." App. B (20a). By this statement, the district court contradicts its earlier statement that "While defendants may have intended their agreements to increase profits, they would hardly intend to drive away viewers by causing increases beyond what the market would bear." App. B (18a).

The lower court committed error in even considering this factor in deciding Respondents' motion to dismiss. "Defendants' request that the Court assume that any increase in . . . charge would be offset by a corresponding decline in other price components, is contrary to the requirement that the movant in a motion for summary judgment has the burden to establish that no triable issue of fact exists, such a pro-tanto reduction remains a triable issue of tact." *Northwestern Fruit Co. v. Levy & Zentner Co.*, 665 F. Supp. 869, 872 (E.D. Cal. 1986). Similarly, Respondents' contentions that local cable operators may have been harmed by a reduction in subscription sales is a triable issue which discovery will reveal is without evidentiary support.

In considering this issue the district court stated "Consumers who paid inflated prices are often denied relief because of their status as indirect purchasers." App. B. (18a-19a). The court' s analysis summarizes rather than supports a conclusion that Petitioners' alleged injury is not the type for which the laws were intended to remedy. Moreover, the court' s statement is in apparent conflict with the Third Circuit's decision in *In re Lower Lake Erie*, 998 F.2d 1144 (3d Cir. 1993), in which the court held that "Although B & LE suggests that indirect purchaser status is the death knell of plaintiffs' claim, this conclusion is not supported by the current law." *Lower Lake Erie*, at 1168.

Respondents rely on the Third Circuit's decision in *Merican, Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1984), *cert. denied*, 465 U.S. 1024 (1984), for the proposition that even where direct purchasers do not sue, and apparently have no intention to bring suit, indirect purchasers have no standing to enforce the antitrust laws. According to the Third Circuit's own interpretation of *Merican*, however, its decision was the result of a simple and mechanical application of *Illinois Brick* which both this Court and the Third Circuit subsequently rejected.

> "While recognizing that the Supreme Court had recently enumerated the list of factors to be utilized in § 4 cases in AGC we decided the case [*Merican*] solely on the operation of the *Illinois Brick* concern, i.e. that the potential for duplicate recovery and complex apportionment of damages meant that plaintiffs were 'not persons injured in their business or property by reason of violation of the antitrust laws within the meaning of section 4.' The facts of the present case [*In re Lower Lake Erie*], however, require, under *AGC*, a more complete analysis." *In re Lower Lake Erie*, 998 F.2d 1144 (1993), (discussing *Associated General Contractors v. Carpenters*, 459 U.S. 519 (1983).

In light of Respondents' willful violation of special interest antitrust legislation, and the unique market powers of more direct purchaser local cable operators, Petitioners' claim deserves "a more complete analysis."

Respondents further rely on this Court's decision in *Kansas et al. v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), for the proposition that direct purchasers may suffer injury despite passing on one hundred percent of the overcharge. *Utilicorp* was an action by indirect purchasers challenging the claim for damages filed by direct purchaser utilities. The *Utilicorp* majority emphasized the regulatory nature of the industry, *Kansas v. Utilicorp*, 497 U.S. at 211, and offered two possibilities for how direct purchaser utilities could suffer injury despite passing on one hundred percent of the illegal overcharge. First, the Court concluded that in order to prove direct purchasers suffered no harm as a result of the price increase, plaintiffs would need to prove that regulators would have "barred any increase except for the amount reflected by the actual cost increases." 497

U.S. at 210. Second, the Court focused on the "lag" period between the direct purchasers' decision to raise prices and the actual implementation of such increase. "During the period in which a utility's costs rise before it may adjust its rates, the utility will bear the costs in the form of lower earnings." *Kansas et al. v. Utilicorp United, Inc.*, 497 U.S. at 210-211 (1990).

Both explanations for potential injury to direct purchasers are not applicable in the case at hand. Local cable operators' decisions on whether or not to raise prices are reviewed *ex poste* not *ex ante*, and they may impose a price increase without need for regulatory approval. Without regulatory review *ex ante* of pricing decisions there is (1) no "lag" period, and (2) there is no need to establish that an approved increase was the maximum that would have been allowed by a regulatory board. Thus, consumers are at the mercy of local cable operators who this court recognized enjoy "undue market power" over consumers and suppliers, *Turner Broadcasting System, Inc., at* 2454, and who Respondents claim enjoy exclusive right to antitrust relief.

Additionally, under *Hanover Shoe* and *Illinois Brick*, the pass on theory may still be used, offensively or defensively, in limited circumstances when tracing the interaction of market forces is unnecessary. *Mid-West Paper Products Co. v. Continental Group, Inc.*, 596 F.2d 573, 577 (3d Cir. 1979). This applies to pre-existing cost-plus pre-packaged tiers of cable services which Petitioners are required to purchase. Local cable operators enjoy monopoly advantages over both suppliers and consumers and are not subject to the usual market forces.

> Despite cable industry claims that competition has arrived or that they are feeling competitive pressure, cable operators have not been able to demonstrate that a competitor or competitors are serving fifteen percent of the market. Even DBS, perhaps the

> most real threat has accumulated less than one-half of one percent of the cable industry's market penetration.
>
> . . . In addition to being able to respond to competition based on rates, the industry has been granted a great deal of flexibility in the way it can market its services. Cable operators are permitted under the regulations to add new programming to regulated tiers at a premium price to consumers above and beyond what they would normally be permitted to charge under the "benchmark", again *without any pre-approval or certification.* They can add these new programs and raise prices whether consumers want the new programming services or not.

Statement of Bradley Stillman, Telecommunications Policy Director Consumer Federation of America, made before the Senate Commerce, Science, and Transportation Committee on the Cable Television Industry Industry, March 21, 1995.

The fifth and final factor to consider is the concern for duplicate recovery and complex apportionment of damages articulated by this Court in *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). The district court stated that "There is potential for duplicate recovery here, as the local cable operators could also sue for having to pay increased costs." App. B (20a). Petitioners, however, propose legal theories for enforcing the antitrust laws without exposing Respondents to duplicate recoveries or complex damages issues.

First, just as Justice Stewart alluded to in oral argument in *Illinois Brick*, the four year statute of limitations applicable to

antitrust actions firmly establishes that there are certain damages which only Petitioners can recover. Because Petitioners filed their suit almost two years earlier, Petitioners have exclusive right to certain damages which are beyond the statutory reach of local cable operators Second, duplicate recoveries could be avoided by recognizing Petitioners' right to injunctive relief and definitively defining the class pursuant to Federal Rule of Civil Procedure 23(c)(1) which provides:

> As soon as practicable after commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended *before a decision on the merits.*

This Court has held that such rules constitute federal procedural law and not substantive law. Lower courts are "instructed to apply the Federal Rule, and can refuse to do so only if the Advisory Committee, the Court, and Congress erred in their prima facie judgment that the rule in question transgresses neither the Enabling Act nor constitutional restrictions." *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

By the plain language of F.R.C.P. 23(c)(1), upon recognition that Respondents had entered into collective agreements in direct violation of their own special interest legislation, and that therefore injunctive relief was proper, the class could be defined and local cable operators precluded from attempting recovery. Despite the Third Circuit's previous recognition that indirect purchaser status does not bar the grant of injunctive relief, the court failed to address Petitioners' 23(c)(1) argument.

Additionally, Interpleader Rule 22 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1335 are designed to protect

defendants not only from double recovery, but also from duality or plurality of suits. *Dakota Livestock Co. v. Keim,* 552 F.2d 1302 (8th Cir. 1977). If Respondents were convinced local cable operators were indeed the proper parties to prosecute this suit, then they should have availed themselves of Rule 22 which states that "A defendant exposed to similar liability may obtain such interpleader by way of cross-claim or counterclaim." F.R.C.P. 22. One of the primary reasons for the existence of the interpleader rule is to allow defendants the option of protecting themselves from possible duplicate recovery. Failure of Respondents to avail themselves of this option to interplead, and Respondents' unclean hands as a result of their deliberate violation of the Sports Broadcasting Act constitutes a waiver of their argument against multiple claims. *Mendez v. Teachers Ins. and Annuity Ass'n,* 982 F.2d 783 (2d Cir. 1992) (Retirement fund's unreasonable delay warranted denial of fund's motion for discharge from further liability). "Because interpleader has its roots in equity, it is subject to certain equitable doctrines such as laches." *Matter of Bohart,* 743 F.2d 313 (5th Cir. 1984); *Bell v. Nutmeg Airways Corp.*, 66 F.R.D. 1 (S.D. Conn. 1975) (Unclean hands and laches available as defense).

Rule 23(c)(1) and Rule 22 along with 28 U.S.C. § 1335 dovetail with the fact Petitioners are the first and only parties to prosecute Respondents' deliberate violation of their own special interest antitrust legislation. In *Great American Ins. Co. v. Spraycraft,* 844 F. Supp. 1188 (S.D. Ohio 1994), the court held:

> Although other defendants argue that a pro rate distribution would be more in keeping with the equitable nature of the interpleader action, this Court finds that application of "first in time, first in right" approach here will not result in injustice. The federal courts have recognized that the "first in time, first in right" rule is grounded in principles of equity.

> *In re Lehigh Valley Mills, Inc.*, 341 F.2d 398, 401 (3d Cir. 1965).

This notion is particularly applicable where Respondent professional sports leagues and Respondent cable television networks base their entire defense on the rights of local cable operators to bring suit. Such a defense invokes the principle of *jus tertii* standing which establishes that in the ordinary course, a litigant must assert his or her own legal rights and interests, and cannot rest a claim for relief on the legal rights or interests of third parties. *Powers v. Ohio*, 499 U.S. 400, 410 (1991). A party may assert a third party's rights only if that third party is unable to assert its own rights . *United States v. Metropolitan St. Louis Sewer Dist.*, 952 F.2d 1040 (8th Cir. 1992). Even where the relationship between such parties is close, the reasons for requiring persons to assert their own rights will generally still apply. *Singleton v. Wulff*, 428 U.S. 106 (1976). Moreover, placing the exclusive right to recover treble damages for antitrust violations in the hands of government sanctioned monopolists strains the boundaries of antitrust jurisprudence.

Petitioners further proposed the use of a *cy pres* distribution to avoid both duplicate recovery and complex apportionment of damages. In *Gammon v. GC Services, Ltd.*, 162 F.R.D. 313 (N.D. Ill. 1995), the court held:

> Class actions are designed "not only to compensate victimized members of groups who are similarly situated . . . but also to deter violations of the law, especially when small individual claims are involved." Disgorgement of illegal gains from wrongdoers, together with . . . application of the recovery for class members under the cy pres doctrine, would fulfill the deterrence objective of class actions.

162 F.R.D. at 321 (citing H. Newberg, *Class Actions*, 3rd Ed. § 4.36 (1992). In *Simer v. Rios*, 661 F.2d 655 (10th Cir. 1981), the court noted: "The fluid recovery [*cy pres distribution*] is used where the individuals injured are not likely to come forward and prove their claims or cannot be given notice of the case. . . . In a fluid recovery the money is either distributed through a market system in the way of reduced charges or is used to fund a project which will likely benefit class members." *Rios*, at 675. The court further stated: "Those cases where a corporate defendant engages in unlawful conduct and illegally profits is most appropriate for fluid recovery." *Rios*, at 677.

If damages are distributed to local cable operators, then those damages would be offset against any damages sought by cable operators in a subsequent action, and the potential for duplicate recovery is avoided. Moreover, under such a *cy pres* distribution, the "next best" distribution pursuant to *cy pres* is equivalent with the "first best" distribution advocated by the Respondents. As stated in *Illinois Brick Co. v. Illinois*, quoting Mr. Justice Brennan in his dissent: "Of course, as Mr. Justice Brennan points out in his dissent, 'from the deterrence standpoint, it is irrelevant to whom damages is paid, so long as someone redresses the violations.' " 431 U.S. 720, 746. Finally, if damages are delivered down the chain of distribution, indirect purchasers will benefit, Respondents will be deprived of their illegal windfall, and the antitrust laws will be vindicated.

In addressing the complex apportionment of damages, Petitioners proposed that damages be determined in accordance with the Ninth Circuit's ruling in *Royal Printing v. Kimberly Clark*, 621 F.2d 323 (9th Cir. 1980), in which the court allowed plaintiff's to sue for the entire overcharge.

> Because, as we have already shown, as a practical matter the direct purchasers will

> never sue, barring Royal Printing's suit would close off every avenue for private enforcement of the antitrust laws in such cases. This would be intolerable.
>
> Allowing Royal Printing to sue for the full overcharge, on the other hand, creates the possibility that Royal Printing might recover an amount, trebled, that exceeds its actual damages; to that extent this alternative affords Royal Printing an opportunity for a windfall gain. But this is no more than was approved in *Hanover Shoe*, where plaintiff was allowed to recover its "full" damages even though it had mitigated its damages by passing on part of the excessive costs to its customers. *Hanover Shoe* teaches that in such situations there is nothing wrong with plaintiff winning a windfall gain, so long as the antitrust laws are vindicated and the defendant does not suffer multiple liability, with its potential for windfall loss (i.e. the defendant would be forced to pay out a greater amount, trebled, than its antitrust violations grossed for it.)
>
> Because there is sufficiently small risk of multiple liability here, and because without the pass-on theory the case would not involve *Illinois Brick* style complexities, we hold that Royal Printing may sue appellees for the entire overcharge.

Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323, 327 (9th Cir. 1980). The potential for complex apportionment or ascertainment of damages, however, is not sufficient reason to

deny standing. *In re Lower Lake Erie*, 998 F.2d 1144, at 1169 (3d Cir. 1993). Denying Petitioners standing due to complex apportionment problems encourages antitrust violators to engage in massive violations creating numerous "victims," and thereby precluding distribution of treble damages. Petitioners proposed that damages be determined by simply establishing the "value" of the pooled agreements between professional leagues and cable networks.

V. Respondent broadcast television networks are liable based on: (1) their direct involvement in pooled agreements with non-exempt cable television networks; (2) their entering into pooled agreements with professional sport leagues after sports leagues had forfeited exempt status by entering into pooled agreements with non-exempt cable television networks.

Prior to Respondent National Football League entering into pooled agreements with cable television networks ESPN and TNT, Respondent broadcast television networks (ABC, NBC, and CBS)[2] owned telecasting rights to all National Football League games. Under the traditional pooled agreements between broadcast networks and National Football League, every National Football League received broadcast television exposure. In order for the National Football League to enter into pooled agreements with cable television networks, broadcast networks had to agree to release one game each week from its traditional pooled agreements with the National Football League. Thus, when the broadcast networks left one National Football League game each week outside the scope of their pooled agreement, the networks had to expect that the National Football League would place these games on some national

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2. In 1994, Fox acquired the rights to National Football League games previously owned by CBS.

cable television network. *See Insurance Antitrust Litigation*, 938 F.2d 919 (9th Cir. 1991), *aff'd in part, rev'd in part on other grounds sub nom. Hartford Ins. Co. v. California*, 509 U.S. 209 (1993), where the prohibition of suits by "indirect purchasers" against upstream price-fixers was not applicable to plaintiffs' claim, not for price fixing, but for withholding desired and previously available coverages from the market.

Moreover, the broadcast television networks never televise a National Football League game in direct competition with the cable television networks. "An exempt entity forfeits antitrust exemption by acting in concert with non-exempt parties." *Group Life & Health v. Royal Drug Co.*, 440 U.S. 205, 231 (1979). The aforementioned circumstances suggest that broadcast networks cooperated with cable television networks' acquisition of telecasting rights to one National Football League game each week. Group Life & Health represents the third of three decisions by this Court declaring that for private parties to enjoy antitrust immunity for collective agreements *all* parties to *all* agreements must qualify for the protection. *Case-Swayne Co. v. Sunkist Growers*, 389 U.S. 384 (1967); *National Broiler Marketing Association v. United States*, 436 U.S. 816 (1977); *Group Life & Health v Royal Drug Co.*, 440 16 U.S. 205 (1979). By releasing one National Football League game each week, and thereby allowing the National Football League to enter into pooled agreements with cable television networks for the telecasting of each game, Respondent broadcast television networks acted in concert with cable networks and forfeited their protection under the Sports Broadcasting Act.

Notwithstanding all four broadcast television networks direct involvement in the transfer of National Football League games to cable television networks, the broadcast networks entered into pooled agreements with the all four professional sports leagues after those leagues had entered into pooled

agreements with cable television networks. Pursuant to *Case-Swayne, National Broilers,* and *Group Life & Health,* the leagues forfeited their exempt status by entering into pooled agreements with cable networks, and any pooled agreement between broadcast networks and leagues which occurred after unprotected agreements with cable television networks are similarly unprotected.

VI. Respondents' claim that Major League Baseball is exempt from antitrust prosecution pursuant to a judicially created exemption is unavailing in that the exemption does not apply to television contracts.

Respondents asserted in their Motion to Dismiss as the trial court level that '"Aside from the antitrust standing issue, none of the antitrust claims may be maintained against the Office of the Commissioner of Baseball, which is exempt from the federal antitrust laws and which in any event has not been named and served as a defendant here." However, Petitioners' action challenges the television agreements of Major League Baseball (Office of the Commissioner of Baseball), and not the game itself.

In *Flood v. Kuhn,* 407 U.S. 258 (1972), Justice Blackmun offered three justifications for "continuing the aberration that has been with us now for half a century," none of which are applicable to the pooled agreements challenged by plaintiff's. First, Justice Blackmun noted that Congress had never seen fit to address the baseball exemption created in *Federal Baseball v. National League*, 259 U.S. 200 (1922). *Flood,* at 283, 284. However, by enacting the Sports Broadcasting Act and including baseball within the coverage of the Act, Congress has seen fit to legislate in the area of baseball's television agreements. Second, Justice Blackmun focused on baseball's reliance on the judicially created exemption. *Flood*, at 283. In light of the fact

that 1988 marked the first pooled agreement between baseball and cable television networks, the reliance factor is inapplicable. Third, Justice Blackmun felt that striking down the judicial exemption might unfairly subject Major League Baseball to significant treble damage awards in suits brought by players *Flood*, at 278, citing *Radovich v. National Football League*, 362 U.S. 445, 450-452 (1957). In this instance, Major League Baseball has violated its own special interest legislation, and any exposure to treble damages awards is well deserved.

The one federal court to consider the issue agreed that contracts between baseball teams and broadcasters are not protected by the judicial exemption. In *Henderson Broadcasting v. Houston Sports Association*, 541 F. Supp. 263 (S.D. Tex. 1982), the court, focusing on Flood's concern with "baseball's unique characteristics and needs," held that broadcast contracts did not fall within that category. "The issue in the case is not baseball but a distinct and separate industry, broadcasting . . . To hold that a radio contract to broadcast baseball games should be treated differently for antitrust purposes than a station's contract to broadcast any other performance or event would extend and distort the specific baseball exemption." 541 F. Supp. 263, at 271.

Finally, subsequent to the decision of this Court in *Illinois Brick*, a number of states including the district of Columbia enacted what were termed "Illinois Brick Repealers." Still other states have interpreted their state statutes to provide for indirect purchaser remedies. In *Cellular Plus, Inc. v. Superior Court*, 14 Cal. App. 4th 1224 (1993), the California State's indirect purchaser statute was cited as a basis for broader standing than may be available in federal court. This Court has held such statutory remedies valid. *California v. ARC America Corp.*, 490 U.S. 93 (1989). ARC seriously compromises *Illinois Brick* insofar as state claims like those in *ARC* are pleaded simply to get

around the direct purchaser rule. The majority of cases will present issues of diversity, and thereby enter the judicial system by way of the federal trial court. By denying standing to Petitioners in these unique circumstances, the Court might encourage exactly what *Illinois Brick* attempted to avoid; piecemeal litigation and multiple recoveries.

CONCLUSION

Despite no bar to Petitioners obtaining injunctive relief, the Third Circuit made "no judgment as to the legality of the sports leagues' contracts with ESPN and Turner, nor do we address whether the SBA can be interpreted to exempt these contracts from the antitrust laws." App. A (8a). Moreover, the court implied that sixty-five million consumers paying higher prices for basic cable television service due to antitrust misconduct by professional sports industry and cable television industry does not implicate the public interest. App. A. (4a) ("We cannot consider arguments for the first time on appeal unless a refusal to do so would result in a manifest injustice or where the public interest requires that an issue be heard."). Failure to address Respondents' apparent willful violation of a statutory antitrust exemption constitutes selective application of the antitrust laws in favor of powerful special interests (vis-a-vis consumers), and is inconsistent with this Court's recognition that '"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom as the Bill of Rights is to the protection of our personal freedom." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972).

For all the foregoing reasons, Timothy Durkin, John Durkin, and Nicholas Bonelli, hereby respectfully petition that a writ of certiorari be issued to review the decision of the Third Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED APRIL 30, 1996

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1687

TIMOTHY DURKIN; JOHN DURKIN; NICHOLAS BONELLI,

Appellants,

vs.

MAJOR LEAGUE BASEBALL; NATIONAL FOOTBALL LEAGUE; NATIONAL BASKETBALL ASSOCIATION; NATIONAL HOCKEY LEAGUE; COLUMBIA BROADCASTING SYSTEM, INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.; ESPN SPORTS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; FOX BROADCASTING, INC.

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 94-05315)
District Judge: Honorable J. William Ditter, Jr.

Appendix A

Submitted under Third Circuit LAR 34.1(a)
March 7, 1996

BEFORE: MANSMANN, ALITO and LEWIS, *Circuit Judges*.

(Filed APR 30, 1996)

MEMORANDUM OPINION OF THE COURT

LEWIS, *Circuit Judge*.

Appellant-plaintiffs Timothy Durkin, John Durkin and Nicholas Bonelli ("Appellants") are disgruntled sports fans seeking to invalidate the Sports Broadcasting Act ("SBA"), 15 U.S.C. §§ 1291-1295, because, they claim, it no longer serves its intended purpose and is not actively supervised. In addition, Appellants seek antitrust treble damages from Appellee-defendants, who are four professional sports leagues, four broadcast television networks, ESPN, Inc. ("ESPN") and Turner Broadcasting Systems, Inc. ("Turner"). The district court granted Appellees' motion to dismiss and denied Appellants' motion for leave to amend their complaint. The district court determined that it lacked jurisdiction to entertain Appellants' first claim and that Appellants lacked standing to pursue their second claim. The district court also held that Appellants' proposed amended complaint does not cure the defects in their Second Amended Complaint. We will affirm.

Inexplicably, in a move akin to complaining about an official's call after the final buzzer has sounded, Appellants filed a "Motion for Partial Summary Judgment or Order Specifying Facts in this Court" with this court (not the district court) *after* the parties had briefed the appeal of the district court's dismissal of the case. As there is no rule, precedent or underlying legal

principle remotely suggesting that Appellants can file a Rule 56 motion in an appellate court, we will deny Appellants' motion and require Appellants to pay Appellees' costs of defending the motion.

I.

The Sports Broadcasting Act provides an antitrust exemption protecting agreements between professional sports leagues and television networks which provide for the telecasting of the leagues' games. 15 U.S.C. §§ 1291-1295. Appellants argue that the sports leagues have entered into anticompetitive contracts with cable television networks (ESPN and Turner) that should be unprotected by the SBA, and that the existence of these contracts forces consumers to pay higher cable television subscription rates.

Before the district court, Appellants sought two rulings: (1) a declaration that the Sports Broadcasting Act is invalid (Counts I and II); and (2) a finding that the pooled-rights television agreements between the defendant professional sports leagues and ESPN and Turner violate the antitrust laws (Count III). As we noted above, the district court held that it lacked subject matter jurisdiction to entertain Appellants' first claim and that Appellants lacked standing to pursue their second claim.

Appellants argue that the district court's dismissal of Counts I and II was erroneous, suggesting that, "in light of work stoppages, soaring consumer costs, and the practice of professional sports leagues to extract sweetheart deals from states and local municipalities at taxpayer expense, the stripping away of [SBA] protection provides the perfect opportunity to restructure professional sports to benefit the consumer."

Appellants' Br. 17. Appellants also challenge the district court's dismissal of Count III, arguing that they have standing to sue for treble damages notwithstanding their status as indirect purchasers.

II.

In Counts I and II, Appellants asked the district court to declare the SBA invalid because it no longer served the purpose for which it was enacted. The district court properly concluded that it lacked subject matter jurisdiction to "usurp Congress' authority to revise, draft, amend or repeal legislation" or to "declare a statute invalid on its face just because there is a lack of Congressional or Executive supervision, reporting, or monitoring." Dist. Ct. Op. 3-6.

The district court correctly recognized the fundamental principle that a court cannot declare an act of Congress invalid on non-constitutional grounds. *See Marbury v. Madison*, 5 U.S. (1 Cranch) 103, 110 (1803) (Marshall, C.J.) ("if the law be constitutional, . . . no court . . . can contest its obligation"). In this appeal, Appellants belatedly concede that their request was improper and that the district court lacked the power to invalidate the SBA. Appellants Br. 13, 15.

On appeal, Appellants argue for the first time that the district court should have interpreted Counts I and II as a request to nullify the protections afforded by the SBA and not the SBA in its entirety. We cannot consider arguments for the first time on appeal unless a refusal to do so would result in manifest injustice or where the public interest requires that an issue be heard. *Fleck v. KDI Slyvan Pools*, 981 F.2d 107, 116 (3d Cir. 1992); *Altman v. Altman*, 653 F.2d 755, 758 (3d Cir. 1981). In this case, there is no

"manifest justice" that requires us to consider Appellants' ill-advised argument. In fact, Appellants' argument to invalidate the protections of the SBA does not differ in substance from its argument to invalidate the entire statute. Indeed, we find it somewhat disingenuous to on one hand admit that a federal court cannot invalidate a statute on non-constitutional grounds and on the other hand argue that the court should invalidate, on non-constitutional grounds, the protections offered by that same statute.

In Count III, Appellants argue that the pooled-rights television agreements between the sports leagues and ESPN and Turner run afoul of the federal antitrust laws. Appellants assert that they and all cable television subscribers are injured by these agreements in the following manner: ESPN and Turner acquire the telecast rights from the sports leagues at substantial expense; ESPN and Turner then pass on this expense by charging higher fees to local cable television operators, who in turn pass on the expense in the form of higher subscription rates to cable subscribers. Appellants suggest that, because they pay these allegedly higher cable rates, they have antitrust standing and are entitled to recover from the sports leagues, ESPN and Turner three times the amount they have been overcharged.

The district court correctly held that Appellants failed to establish an injury that would support antitrust standing. Dist. Ct. Op. 8-11. The Supreme Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), and its progeny foreclose Appellants' argument and support the district court's ruling. In *Illinois Brick*, the Court held that indirect purchasers lack standing to bring treble damages in antitrust actions for costs allegedly passed on by direct purchasers. *Id.* at 746-48.[1]

1. In *Illinois Brick*, the Supreme Court set out two narrow exceptions to (Cont'd)

Appellants fail to articulate a rational argument supporting the creation of an exception to the indirect purchaser rule in this case. In fact, arguments substantially similar to Appellants' arguments for an exception have previously failed before both the Supreme Court and this court. *See Kansas v. Utilicorp United Inc.*, 497 U.S. 199, 209-12 (1990) (denying indirect purchasers standing even if the direct purchasers had been able to pass on 100 percent of their increased costs to the indirect purchasers); *Merican. Inc. v. Caterpillar Tractor Co.*, 713 F.2d 958 (3d Cir. 1983) (denying indirect purchasers standing even though the direct purchasers did not — and most likely would not have — sued).

As such, we will affirm the district court's dismissal of each of Appellants' Counts.

III.

As we discussed above, Appellants filed with this court a "Motion for Partial Summary Judgment or Order Specifying Facts in this Court" after the parties had briefed the present

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(Cont'd)
the direct-purchaser rule. Neither of these exceptions apply here. First, an exception may be warranted where the direct purchaser operates under a cost-plus contract whereby the direct purchaser "is insulated from any decrease in sales as a result of attempting to pass on the overcharge, because its customer is committed to buying a fixed quantity regardless of price." 431 U.S. at 736. Appellants have not alleged the existence of any such contracts in this case.

Second, an indirect purchaser may have standing where the direct purchaser is owned by or controlled by the indirect purchaser so that in effect only one transaction has taken place. *Id.* at 736 n.16. Appellants have not made any such allegations here.

appeal. As we also stated, this unprecedented motion was filed in the wrong court at the wrong time. Apparently, Appellants mistakenly believed that Federal Rule of Civil Procedure 56, which governs only the United States district courts, *see* Fed. R. Civ. P. 1, provided the authority for their motion.

Appellees have sought sanctions for reasonable attorney's fees for having to respond to Appellants' motion. We have held that sanctions are warranted to preserve our time and "to discourage litigants from wasting their opponents' time and resources." *Nagle v. Alspach*, 8 F.3d 141, 145 (3d Cir. 1993). Appellants attempt to avoid sanctions by arguing that Local Appellate Rule 27.4 provides the authority for their motion.

Local Appellate Rule 27.4 provides that:

> A party may move for summary action affirming, enforcing, vacating, remanding, modifying, setting aside or reversing a judgment, decree or order, alleging that no substantial question is presented or that subsequent precedent or a change in circumstances warrants such action. . . .

L.A.R. 27.4. Appellants have offered, and can offer, no authority for the proposition that Local Appellate Rule 27.4 can permit a party to move for partial summary judgment in a case that is pending on appeal. Appellants' reading of Local Appellate Rule 27.4 is the product of twisted and tortured reasoning and was not offered until Appellees, in their response to Appellants' motion, pointed out that Rule 56 did not permit Appellants' filing of their partial summary judgment motion. Thus, Appellants' last minute shot at invoking Local Rule 27.4 as authority for their baseless motion results in an "air-ball."

As such, we deny Appellants' "Motion for Partial Summary Judgment or Order Specifying Facts in this Court" and hold that it is patently baseless and warrants the imposition of sanctions. In this case, Appellants at some point adopted a "you can't score if you don't shoot" theory. With respect to the motion for partial summary judgment, Appellants should have refrained from taking the shot.

Accordingly, we will impose sanctions upon Appellants in an amount equal to Appellees' costs in defending the motion.

IV.

"No harm, no foul," is perhaps the most appropriate way to characterize Appellants' claims. We make no judgment as to the legality of the sports leagues' contracts with ESPN and Turner, nor do we address whether the SBA can be interpreted to exempt these contracts from the antitrust laws. We only affirm 8 the district court's holding that it did not have subject matter jurisdiction to invalidate the SBA and that Appellants did not have standing as indirect purchasers to recover antitrust damages from Appellees.

While it is true that labor disputes, franchise relocations and other money-driven issues now permeate professional sports, the proper vehicle to voice concerns about these issues is not a lawsuit that lacks a sound legal and factual basis. In fact, bringing a lawsuit such as this one risks the trivialization of the legitimate interests of sports fans as consumers. Indeed, there may be situations in which the activities of professional sports leagues legally injure the "consumers" of their products, but that is clearly not what occurred in this case.

Appendix A

Accordingly, we will affirm the district court's order granting Appellees' motion to dismiss and its denial of Appellants' motion for leave to amend their complaint. We also deny Appellants' "Motion for Partial Summary Judgment or Order Specifying Facts in this Court," and direct that Appellants pay Appellees' costs in defending this motion. In order to help us determine the amount of the sanctions, Appellees shall submit to the Clerk an affidavit detailing their costs incurred in defending the motion. Appellants may, if they wish, file a response to the appellees' affidavit.

TO THE CLERK:

Please file the foregoing opinion.

s/ Dorothy K. Lewis
Circuit Judge

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 95-1687

TIMOTHY DURKIN; JOHN DURKIN; NICHOLAS BONELLI,

Appellants,

vs.

MAJOR LEAGUE BASEBALL; NATIONAL FOOTBALL LEAGUE; NATIONAL BASKETBALL ASSOCIATION; NATIONAL HOCKEY LEAGUE; COLUMBIA BROADCASTING SYSTEM, INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.; ESPN SPORTS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; FOX BROADCASTING, INC.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on March 7, 1996.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on July 17, 1995, be and the same is hereby **AFFIRMED**.

Costs taxed against Appellants.

Appendix A

ATTEST:

s/ P. Douglas Sisk
Clerk

Date: APR 30 1996

APPENDIX B — OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA FILED JULY 17, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 94-5315

TIMOTHY DURKIN, et al.

v.

MAJOR LEAGUE BASEBALL, et al.

ORDER

AND NOW, this 13th day of July, 1995, defendants' motion to dismiss plaintiffs' second amended complaint is GRANTED, and plaintiffs' motion for leave to amend their second amended complaint is hereby DENIED.

In conjunction with this order I make the following findings:

1. Plaintiffs are disgruntled sports fans seeking to represent the purchasers of tickets to professional sporting events, specifically, baseball, basketball, football, and hockey. The defendants are the associations or leagues for those professional sports, four major television networks (ABC, NBC, CBS, and Fox), and two major cable television networks (ESPN and Turner Broadcasting).[1] The gravamen of the complaint is that the

1. Plaintiffs filed a motion to certify the class. In a separate order dated July 13, 1995, I denied plaintiffs' motion.

defendant leagues and networks have entered into agreements for the television broadcast of games pursuant to the antitrust exemption granted in the Sports Broadcasting Act ("SBA"), 15 U.S.C. § 1291, and that the SBA benefits defendants more than it benefits the public. Congress enacted the SBA, plaintiffs claim, to ensure that professional teams in smaller television markets would still receive television coverage and income from the broadcast of their games, and that fans in smaller-market areas would still see their teams' events on network, or free, television, as opposed to viewing telecasts only on cable, or paid subscription, television. Plaintiffs allege that but for the SBA, the broadcast agreements would be in violation of federal antitrust laws because the agreements pool the sale of television rights.

2. Plaintiffs' complaint has three counts. Count 1 seeks judicial review of the SBA and a declaration that the SBA is invalid because it "no longer serves the purposes for which it was enacted." Specifically, plaintiffs allege that the SBA no longer protects the consumer-fan, "for whom all antitrust laws and exemptions are enacted." Plaintiffs allege that the sports leagues sell their pooled television rights to subscription television broadcasters in addition to the free networks, with the result that sports fans must pay cable television fees in order to view certain sporting events that are not televised on free television. Count 2 seeks a declaration that the SBA is invalid on its face because there has been no active supervision of the antitrust exemption to ensure that the public benefits. Count 3 asserts that pooled-rights broadcast agreements between the defendant leagues and the defendant cable networks are outside the scope of the SBA and violate federal antitrust laws.

3. Defendants moved to dismiss plaintiffs' complaint on

the grounds that this court does not have subject matter jurisdiction over counts 1 and 2 and because plaintiffs lack standing to pursue count 3. I heard oral argument on their motion.

4. As defendants assert and plaintiffs concede, the judiciary does not have the general power to review and nullify a duly-passed statute on the ground that it no longer serves its intended purposes. Rather, a court can declare a statute void only if the law is "repugnant to the [C]onstitution." *See Marbury v. Madison*, 1 Cranch 137 (U.S. 1803). Plaintiffs suggest that "in addition to reviewing statutes based on constitutional infirmities, courts have the power to review and strike statutes that violate our 'economic liberties.' " Allowing courts to review antitrust statutes, plaintiffs argue, would assist the legislature in managing its workload. Respectfully, I must decline plaintiffs' invitation to usurp Congress' authority to revise, draft, amend, or repeal legislation. Plaintiffs do not allege that the Sports Broadcasting Act is unconstitutional, only that it no longer serves its intended purpose. That a law may be obsolete, ill-conceived, unnecessary, or irrelevant is not a reason for judicial review. Because I do not have subject matter jurisdiction to assess whether the SBA serves its intended purpose or is a candidate for repeal, defendants' motion to dismiss count 1 must be granted. In the alternative, plaintiffs have failed to state a claim upon which relief can be granted because the relief they seek — nullification of a statute for reasons other than its unconstitutionality — is relief this court does not have authority to grant.

5. Similarly, defendants' motion to dismiss count 2 must be granted. Plaintiffs aver that I should invalidate the SBA because the statutory grant of antitrust immunity has been inadequately supervised and the Act is therefore invalid on its face. Plaintiffs

argue that a lack of active supervision can be grounds for invalidating an antitrust exemption. The cases they argue in support of this proposition, however, are inapposite to the case at bar because they involve state regulatory laws — not federal laws — that would otherwise violate the Sherman Act.

A state regulatory program is immune from a Sherman Act challenge if the state statute clearly expresses a state policy and the policy is actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum Inc.*, 445 U.S. 97, 99, 102 (1980); *Parker v. Brown*, 317 U.S. 341 (1943). The antitrust immunity established in *Parker* was rooted in principles of federalism, for the Sherman Act's purpose is not to nullify state powers. *See Parker*, 317 U.S. at 350-52. While "state" is sometimes used synonymously with "government," it is not so used in this context. That is, the requirement of active state supervision over a state policy cannot be read so broadly as to require active federal supervision over a federal policy. In *California Retail Liquor*, for example, a case on which plaintiffs rely, the Supreme Court invalidated a California statute requiring price maintenance and price posting within the wholesale wine industry. 445 U.S. at 99, 102. Because the state law did not establish prices, review the reasonableness of prices, monitor market conditions, or engage in reexamination of the pricing program, the Supreme Court held that the California statute did not provide for sufficient state involvement to establish antitrust immunity under *Parker*. *California Retail Liquor* does not support the proposition that a federal exemption to the Sherman Act can be nullified for lack of sufficient federal involvement or supervision; it discusses examples clearly within the context of laws promulgated by one of the 50 states. *See* 445 U.S. at 104-05 (discussing fee schedules enforced by Virginia State Bar Association, Arizona rules against lawyers'

advertising, and California statute addressing location of car dealerships). *See also F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, __ (1992) (discussing roots of *Parker* doctrine that state regulatory programs could supersede Sherman Act). Therefore, I find that there is no express or implicit requirement that Congress can grant exemptions to the Sherman Act only if there is adequate supervision over the exemption.

6. Even if I accept plaintiffs' argument that cases addressing state-action antitrust immunity are applicable to federal statutes granting antitrust immunity, and even if I accept as true, as I must in considering a motion to dismiss, plaintiffs' allegations that there is inadequate federal supervision over the SBA's antitrust exemption, they still have not stated a claim upon which relief can be granted. As discussed in ¶ 4, unless a law is contrary to the Constitution, a court has no authority to declare it invalid. Plaintiffs do not assert that any provision of the SBA is unconstitutional, only that there is insufficient federal supervision of its grant of antitrust immunity. A court cannot declare a statute invalid on its face just because there is a lack of Congressional or Executive supervision, reporting, or monitoring. Defendants' motion to dismiss count 2 must therefore be granted.

7. Finally, plaintiffs in count 3 seek damages from the professional sports leagues and the cable television networks ESPN and TBS, whose programming consists solely (ESPN) or primarily (TBS) of sporting events. Plaintiffs maintain that the cable networks incur great expense in acquiring the pooled broadcast rights for professional sporting events. These costs are passed on to viewers such as plaintiffs through higher cable television subscription rates. Because the pooled rights agreement are outside the scope of the SBA, plaintiffs argue,

they are not exempt from antitrust law. Further, plaintiffs argue, because the agreements cause higher cable subscription rates, they have suffered an antitrust injury. Defendants argue that plaintiffs lack standing to maintain count 3, the only count asserting an antitrust violation.

8. Plaintiffs are correct that consumers who pay more money for a product because of an antitrust violation can sustain antitrust injuries even though they are not competitors in a particular industry. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). That does not mean, however, that the plaintiffs necessarily have antitrust standing. Thus, even accepting as true plaintiffs' allegations that they suffered an antitrust injury because their cable subscription rates increased as a result of the cable companies' having to pay more to buy broadcast rights, does not end the standing inquiry.

Plaintiffs admit that they are indirect purchasers of cable television subscriptions from ESPN and TBS. The defendant leagues sell pooled rights to the defendant cable networks, which in turn arrange with local cable television operators to carry their programming. The local operators sell cable subscriptions to television viewers such as plaintiffs. In general, indirect purchasers lack standing to bring antitrust suits. *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199, 216 (1990); *Illinois Brick v. Illinois*, 431 U.S. 720, 735 (1977). While *Utilicorp* urged courts not to carve out exceptions to the direct-purchaser rule, the Third Circuit has declined to apply a blanket rule that all indirect purchasers are automatically barred from bringing suit for antitrust injuries. The Third Circuit, noting that the *Utilicorp* decision addressed the peculiarities of standing within the context of regulated public utilities, employed a more in-depth standing analysis. *In re Lower Lake Erie Iron Ore Antitrust Lit.*, 998 F.2d 1144, 1167 n. 21 (3d Cir. 1993).

Appendix B

Based on the Supreme Court's decision in *Associated General Contractors. Inc. v. California State Council of Carpenters*, the Third Circuit discussed the factors a court should consider in determining antitrust standing. *Lower Lake Erie*, 998 F.2d at 1165 (citing 459 U.S. 519 (1983)).[2] These are: (1) causal connection between antitrust violation and harm to plaintiff and defendant's intent to cause that harm; (2) whether injury is type for which antitrust laws were intended to provide redress; (3) directness of the injury; (4) existence of more direct victims; (5) potential for duplicative recovery or complex apportionment of damages. *Lower Lake Erie*, 998 F.2d at 1165-66. Having applied these factors, I find that plaintiffs do not have standing to maintain this action.

9. The first factor weighs against plaintiffs' standing. Assuming as true plaintiffs' allegations that they are injured by the pooled rights agreements because they pay higher cable subscription rates, the alleged antitrust violation (the pooled rights agreements which are alleged to be outside the SBA's antitrust exemption) is not a legal cause of plaintiffs' alleged injury (higher subscription rates). Moreover, plaintiffs' argument that defendants intended to increase the monthly cable subscription rates and thus injure plaintiffs defies economic sense. While defendants may have intended their agreements to increase profits, they would hardly intend to drive away viewers by causing cost increases beyond what the market would bear.

10. The second factor, concerning the goal of the antitrust laws, similarly weighs against plaintiffs' standing. Indeed, as the Supreme Court stated in *Utilicorp*, consumers who paid inflated

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2. Although *Associated General Contractors* involved antitrust injury and not antitrust standing *per se*, the Supreme Court did not distinguish between the two concepts.

prices are often denied relief because of their status as indirect purchasers. 497 U.S. at 211. Nonetheless, the Court held, while the rationales underlying *Illinois Brick* may apply unevenly, carving out exceptions was unwarranted. *Id.* at 216-17. Thus, I find that the goal of the antitrust laws does not encompass suit by every consumer in a distribution chain who pays higher prices because of activities further up the chain.

11. The third factor, directness of the injury, also weighs against antitrust standing. It may well be that the local cable operators have borne the brunt of the alleged antitrust violation because they are the ones who must pay the allegedly increased price to carry the programming. Even if, as plaintiffs allege, the local operators pass on 100 percent of the increased costs to subscribers, plaintiffs' injury is not direct and cannot bypass the rule of *Illinois Brick*.[3] Plaintiffs contended at oral argument that theirs is a unique instance where, because of the illegal activity, they become indirect purchasers. "It's only in our case," plaintiffs argued, "where if the defendants obey the law, we're direct consumers." Plaintiffs' argument is unavailing. Even if the defendant leagues and cable networks did not enter into the pooled rights agreements, plaintiffs would still not be direct purchasers. Plaintiffs do not allege that they could somehow contract directly with the cable networks to view the networks' sports programming. Rather, the local cable operators would still have to agree to carry the networks' programming. Thus, whether or not the defendants unlawfully enter into the pooled

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3. I note that plaintiffs assume that they are directly injured, while local operators are not, because local operators can pass on the entire cost. Aside from the Supreme Court's rejection of offensive use of the pass-on theory in *Illinois Brick*, the local operators could well be injured by loss of subscribers who refuse to pay the passed-on, higher rate. To keep subscribers, the local operators may choose not to pass on the costs.

rights agreements, plaintiffs are indirect purchasers of the cable networks' sports programming.

12. Existence of more direct victims, the fourth factor, also counsels against plaintiffs' standing. As discussed above, the local cable operators are more directly affected by the alleged antitrust violations. Even if they are able, as plaintiffs suggest, to recover all of their increased costs, the operators still run the risk of losing customers or having to absorb the costs.

13. Finally, the fifth factor to consider is the potential for duplicative recovery or complex apportionment of damages. There is the potential for duplicate recovery here, as the local cable operators could also sue for having to pay (or pass on) increased costs. Thus the case at bar is unlike *Lower Lake Erie*, where different parties alleged different injuries. 998 F.2d at 1169. In addition, apportioning damages would be prohibitively complex, as a court would have to consider to what extent the local operators lost subscribers due to the increased costs and then either absorbed those damages or passed them on to current subscribers, while subscribers' increased costs would have to be calculated to determine precisely which charges resulted from the defendants' activities as opposed to other networks' fees which help determine a single subscription package.

14. In conclusion, based on consideration of the factors stated in *Lower Lake Erie*, I find that plaintiffs lack standing to maintain their antitrust suit. Therefore, defendants' motion to dismiss count 3 for lack of standing must be granted. Because plaintiffs have failed to state a claim upon which relief can be granted in counts 1 and 2, and because they lack standing to bring count 3, defendants' motion to dismiss plaintiffs' complaint against them must be granted.

Appendix B

15. In addition to their response to defendants' motion to dismiss the complaint, plaintiffs filed a motion for leave to amend the complaint. Plaintiffs attached the proposed amended complaint to their motion. The complaint would be plaintiffs' third. Federal Rule of Civil Procedure 15(a) provides that after a responsive pleading has been filed, "a party may amend the party's pleading only by leave of court; and leave shall be freely given when justice so requires." While leave to amend should be freely given, it is not automatically granted. *Foman v. Davis*, 371 U.S 178 (1962). For example, a court may refuse to allow an amended complaint that fails to state a cause of action. *J.E. Mamiye & Sons, Inc. v. Fidelity Bank*, 813 F.2d 610, 613 (3d Cir. 1987); *Phoenix Technol, Inc. v. TRW, Inc.*, 154 F.R.D. 122, 123 (E.D. Pa. 1994). Similarly, if the proposed amendment fails to cure defects of the first pleading, leave to amend need not be given. *Denny v. Barber*, 576 F.2d 465, 471 (2d Cir. 1978); *Durham v. Fleming Co.*, 727 F. Supp. 179, 180 (E.D. Pa. 1989).

16. In this case, plaintiffs' proposed amended complaint does not cure the defects in the amended complaint, discussed in ¶¶ 2-14. The proposed complaint alleges the same three counts and states the same grounds for relief: the Sports Broadcasting Act no longer serves its purpose (count 1); the Act is invalid on its face because of inadequate supervision (count 2; and the pooled rights agreements with cable television networks are outside of the Act's exemptions and violate federal antitrust laws (count 3). The proposed amendment adds factual allegations about, for example, stadium funding, corporations' purchase of blocks of tickets, and numbers of television viewers. It does not, however cure the twin defects of seeking relief which this court cannot order (invalidating a federal statute on grounds other than unconstitutionality) and lacking standing as indirect purchasers to bring an antitrust claim. Therefore, plaintiffs' motion for leave

to amend their amended complaint and file a third complaint must be denied.

BY THE COURT:

s/ illegible

ENTERED: 7/17/95

CLERK OF COURT

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION
No. 94-5315

TIMOTHY DURKIN, et al.

v.

MAJOR LEAGUE BASEBALL, et al.

ORDER

AND NOW, this 13th day of July, 1995, plaintiffs' petition to certify a class is hereby DENIED.

In conjunction with this order I make the following findings:

1. Plaintiffs are sports fans seeking to represent the purchasers of tickets to professional baseball, basketball, football, and hockey games. The defendants are the associations or leagues for those professional sports, four major television networks (ABC, NBC, CBS, and Fox), and two major cable television networks (ESPN and Turner Broadcasting).

2. Defendants filed a motion to dismiss plaintiffs' complaint against them. I ordered that defendants need not reply to the petition for class certification until the motion to dismiss had been resolved.

3. In an order dated July 13, 1995, I granted defendants' motion to dismiss and denied plaintiffs' motion for leave to file an amended complaint.

Appendix B

4. Because the action has now been dismissed, plaintiffs' petition for class certification must be denied.

BY THE COURT:

s/ illegible

ENTERED: 7/17/95

CLERK OF COURT

(2)

Supreme Court, U.S.
FILED
SEP 9 1996
OFFICE OF THE CLERK

No. 95-2085

In The

Supreme Court of the United States

October Term, 1995

TIMOTHY DURKIN; JOHN DURKIN; NICHOLAS BONELLI,
Petitioners,

vs.

MAJOR LEAGUE BASEBALL; NATIONAL FOOTBALL LEAGUE; NATIONAL BASKETBALL ASSOCIATION; NATIONAL HOCKEY LEAGUE; COLUMBIA BROADCASTING SYSTEM, INC.; AMERICAN BROADCASTING COMPANIES, INC.; NATIONAL BROADCASTING COMPANY, INC.; ESPN SPORTS NETWORK, INC.; TURNER BROADCASTING SYSTEM, INC.; FOX BROADCASTING, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

GREGORY VEITH
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(610) 642-3620

9 pp

TABLE OF CITATIONS

New cases cited:

Bell v. Hood, 327 U.S. 678 (1946) 6

California v. American Stores Co., 110 S.Ct. 1853 (1990)..... 2,3

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986)..... 1

Fallis v. Pendleton Woolen Mills, Inc., 866 F.2d 209 (6th Cir. 1989)..... 5

International Boxing Club of New York, Inc. v. United States, 358 U.S. 242 (1958)..... 2

Petitioners to this point have demonstrated both: 1) that the plain language of the Sports Broadcasting Act (SBA) and its legislative history reveal that the legislature did not intend to protect collective agreements between professional sports leagues and cable television networks; and 2) that legal precedent and Title 15 U.S.C. § 16(a) support a prima facie case that the challenged agreements violate the antitrust laws.

This Court has consistently held that the antitrust laws should be enforced vigorously. "We have maintained, throughout our cases, that our interpretation of § 4 cases must promote the vigorous enforcement of the antitrust laws." *Kansas v. Utilicorp*, 497 U.S. 199, 214 (1990). Despite this well established interest in enforcing the antitrust laws, the Third Circuit denied Petitioners remand to the district court even on the issue of injunctive relief.

In rejecting Petitioners' request for injunctive relief, the Court ignored its own recognition just three weeks earlier that: "In *Mid-West Paper*, we expressly rejected the contention that the direct purchaser rule bars injunctive relief under section 16 as well as treble damages suits under section 4." *McCarthy v. Recordex*, 80 F.3d 842, 856 (3d Cir. April 4, 1996)(citing to *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 111 (1986). The Third Circuit's inconsistent decisions in *Merican, Inc. v. Caterpillar*, 713 F.2d 958 (3d Cir. 1984), *Lower Lake Erie*, 998 F.2d 1144 (3d Cir. 1993), *McCarthy v. Recordex*, 80 F.3d 842 (3d Cir. 1996), and the instant case not only chill enforcement of the antitrust laws, but promote circumstances where even a willful violation of special interest antitrust legislation may not be prosecuted.

When industries violate their own special interest antitrust statute, this Court has seen fit to withdraw the statutory protection altogether. See *Case-Swayne v. Sunkist Growers, Inc.*, 389 U.S. 384 ((67); *National Broiler Ass'n. v. United States*, 436 U.S. 816 (1978); *and Group Life & Health v. Royal Drug Co.*, 440 U.S. 205 (1979). Respondents have not disputed Petitioners' claim that games which have been sold by way of collective agreements have been televised on cable television networks.

Not only have Respondents engaged in conduct beyond the statutory protection of the SBA, but they seek to defend their conduct by relying on the fact that the unauthorized agreements have rendered Petitioners "indirect" by injecting local cable operators into the distribution chain. See *NCAA v. Board of Regents*, 468 U.S. 85, at 111 (1984)(where the Court citing *International Boxing Club of New York, Inc. v. United States*, 358 U.S. 242 (1958), concluded that viewers of college football games on broadcast television are the relevant consumers of the product.)

Even assuming the Court allows Respondents to transform Petitioners into indirect purchasers by way of illegal agreements, *Illinois Brick* merely denies direct reimbursement to indirect victims. It does not prohibit disgorgement.

Indeed, Petitioners' right to disgorgement is encompassed within their right to injunctive relief. *California v. American Stores Co.*, 110 S.Ct. 1853, 1859 (1990). "Divestiture has been called the most important of antitrust remedies." *American Stores*, at 1859. Moreover, § 16 of the Clayton Act "states no restrictions or exceptions to the forms of injunctive

relief a private plaintiff may seek, or that a court may order." *American Stores,* at 1859.

Disgorgement through *cy pres.*

Petitioners have maintained throughout this litigation that they were indifferent to how the illegal windfall profits were distributed. *Illinois Brick* supports Petitioners' indifference by establishing that: "From a deterrence standpoint, it is irrelevant to whom damages is paid, so long as someone addresses the violation." *Illinois Brick,* at 746.

To maintain symmetry with *Illinois Brick*, Petitioners proposed a *cy pres* distribution which reimburses direct purchaser local cable operators, and allows for vindication of the antitrust laws. Respondents cannot oppose awarding standing to Petitioners on grounds that more direct purchaser local cable operators have suffered harm, and then oppose a *cy pres* distribution to those same local cable operators.

Moreover, a *cy pres* distribution to local cable operators forecloses any potential for duplicate recovery by direct purchasers, and presents no greater complexity than a suit brought by direct purchaser local cable operators. In addition to addressing the two *Illinois Brick* concerns, a *cy pres* distribution to local cable operators also provides an opportunity to indirectly benefit Petitioners. Petitioners could benefit through re-regulation of the cable television industry under the 1992 Cable Act. In light of such regulation, it is possible that "...regulators would require the utilities [cable television industry] to pass on at least some of the recovery obtained in a §4 suit." *Kansas v. Utilicorp*, 497 U.S. 199, 212

(1990).

Petitioners' antitrust injury.

Petitioners note that in addition to causing Petitioners to pay higher cable television rates, the challenged pooled agreements between professional leagues and cable television networks also reduce the output of telecasts on *free broadcast television* which remains the limited focus of the SBA.

Respondent broadcast network CBS (or any other national broadcast network), which reaches approximately thirty million more households than cable television networks, presently owns no telecasting rights to professional sporting contests between clubs in the NFL, NBA, NHL, or Major League Baseball. Given the extreme popularity of professional sports, it is implausible that CBS would have no interest in bidding on the challenged pooled television packages eventually sold to cable networks. Thus, any league television package sold by pooled agreement to ESPN or Turner, without providing CBS an opportunity to bid on the package, represents a pooled agreement outside the scope of the SBA which reduced output on free broadcast television.

Discovery would reveal whether CBS was provided an opportunity to bid on the telecasting rights contained in pooled agreements between leagues and cable networks, or if the leagues "set aside" these games for cable, or pay-television only. If the leagues did "set aside" certain packages for cable networks, then these set asides reduce output of telecasts on free broadcast television while increasing Petitioners' monthly cable television rates.

Even assuming national broadcast television networks were given the opportunity to bid on the leagues' pooled packages, and the leagues sold games by way of pooled agreements to ESPN and Turner because the cable networks offered the highest bid, then the leagues entered into collective agreements outside the scope of the SBA for the purpose of: 1) increasing profits, and 2) reducing output by thirty million households.

Finally, Petitioners request that certiorari be granted to resolve the inconsistencies in antitrust standing analysis applied by the federal courts. See *Lower Lake Erie (employed* the AGC analysis) , *McCarthy v. Recordex*, 80 F.3d 842 (3d Cir. 1996) *(*did not use the *AGC* analysis*), Fallis v. Pendleton Woolen Mills, Inc.*, 866 F.2d 209 (6th Cir. 1989) (used AGC test). Petitioners believe that the bar would benefit by this Court clarifying the doctrinal relationship between *Illinois Brick* and *Associated General Contractors.*

In *McCarthy v. Recordex,* the Third Circuit held that absent concerns for duplicate recovery antitrust standing is to be determined by the five part *AGC* test employed in *Lower Lake Erie. "Lower Lake Erie* is fully distinguishable. In *Lower Lake Erie,* we found that the plaintiffs' claims did not involve 'the particular kind of double recovery *Illinois Brick* sought to prevent.'" *McCarthy v. Recordex*, 80 F.3d 842, 851 (3d Cir. 1996). Under Petitioners' proposed *cy pres* distribution to direct purchasers, there is no potential for duplicate recovery.

"Where legal rights have been invaded and a cause of action is available, a federal court may use any available remedy to make good the wrong done." *Bell v. Hood,* 327 U.S.

678, 684 (1946). While a *cy pres* distribution of damages to local cable operators would not implicate the dual concerns expressed by this Court in *Illinois Brick*, it would require Respondents to forfeit their illegally obtained revenues. It would also allow the antitrust laws to be enforced.

Wherefore, Petitioners again respectfully ask this Court to grant certiorari to review Petitioners' requests for both injunctive relief and standing to pursue treble damages against Respondents for their deliberate violation of the Sports Broadcasting Act.

Respectfully submitted

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AFFIDAVIT OF SERVICE

I hereby certify that copies of Petitioners' Supplemental Brief have been served by Federal Express on the following counsel this 9th day of September, 1996:

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